22-6-71 Judgment 29-9-71, 41/71
A.G. informed. Appellant
no Reply.

G.P.-S. J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

RALPH WILLIAM SEITZ

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney Horwitz, Arnaud & Lewis / *Respondent's Attorney* Dep.A.G.(Jhb.)
Prokureur van Appellant / *Prokureur van Respondent*

Appellant's Advocate E. Zuurenstein SC / *Respondent's Advocate* R.J. Strauss
Advokaat van Appellant D.A. Kuny / *Advokaat van Respondent*

Set down for hearing on 2-9-1971
Op die rol geplaas vir verhoor op

(W.I.D.) WESSELS, A.R. JANSEN, A.R. RABIE, A.R.

9.45 - 10.53 am.
10.53 - 11.00 am.
11.15 - 12.22 am.
12.22 - 12.53 pm.

C.A.V.

to enter ... Appellant Discharged (Vide ...)

REGISTRAR, ...
DEPUTY

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

RALPH WILLIAM SEITZ ..... APPELLANT.

AND

THE STATE ..... RESPONDENT.

CORAM: WESSELS, JANSEN et RABIE, JJ.A.

HEARD: 2 September 1971. DELIVERED: 29·9·1971

J U D G M E N T.

WESSELS, J.A. :

The appellant was found guilty by Cillié, J.P., sitting in the Witwatersrand Local Division, of theft and sentenced to two years imprisonment. The appellant's appeal against his conviction comes before this Court with the leave of the Court a quo. It was alleged in the indictment that during October 1969, the appellant stole 23 diamonds and a diamond ring from the complainant, Louis Lipchin. Two alternative charges, one of the theft of money (the proceeds of the diamonds and the diamond ring mentioned in the main count) and one of

fraud were incorporated in the indictment, but it is unnecessary to set out the details thereof.

In his judgment, the learned Judge President remarked, "I have not often tried a case in which so many witnesses were untruthful, outside and inside the court, but this lying and perjury does not relieve the Court of its duty, which is to investigate whether the State has proved beyond reasonable doubt that the complainant had delivered the diamonds and the ring to the accused, and, if so, to investigate whether, he returned the diamonds or paid the price for them". After a detailed survey of the evidence adduced on behalf of the State and by the appellant, the Court a quo concluded that the guilt of the appellant had been established beyond any reasonable doubt.

The evidence on which the State relied may be summarised as follows. The complainant, Louis Lipchin, had carried on business in Johannesburg as a manufacturing jeweller for some fifteen years until he sold the business during June or July 1969. Shortly thereafter he commenced business as a registered diamond dealer, and rented an office in the Diamond Exchange Building in De Villiers Street, Johannesburg. Some

3/.....weeks

weeks prior to 9 October 1969, Lipchin and appellant were concerned in a transaction regarding a 9.96 carat diamond which was handed over by the former to the latter for the purpose of finding a buyer. From a document signed by appellant at the time, it appears that Lipchin wanted R5.000 for the stone. If appellant were to find a buyer at a higher figure, the excess would be his commission. Appellant could not find a buyer and within "a day or two" returned the diamond to Lipchin. It is clear from the record that this transaction was concluded without giving rise to any ill-feeling or trouble. I might mention that although it would appear that Lipchin and appellant had had no prior business dealings or social contact with each other, Lipchin had known appellant for some considerable time. In answer to a question, suggesting that he "had known the accused since childhood days", Lipchin replied, "Well, I had always known him about; I had always seen him. I had no actual business with the accused".

It is common cause that Lipchin and appellant by appointment met each other at about midday on 8 October 1969 at a café in Hillbrow, Johannesburg. Appellant had telephoned Lipchin earlier that morning and told him that he wanted to see

him urgently because he had a customer who wanted to buy diamonds. They met at the café. Appellant arrived in "an American type sports car, a Pontiac, a two-door car". He joined Lipchin in the latter's car, and they then proceeded to the Casa Blanca road-house in Nugget Street, Johannesburg. A Mr. Gerald Arsenis followed them in the Pontiac car. At the road-house Arsenis joined Lipchin and appellant in Lipchin's car. Arsenis told Lipchin that he was interested in buying diamonds on behalf of his father, and mentioned a figure of "about R40.000". Lipchin's evidence is to the effect that he told Arsenis that he had no diamonds "of any real consequence" on him, and that it would be difficult to get "that volume" on such short notice. It was explained to him that the diamonds were required urgently. Lipchin promised to do his best to obtain diamonds, and arranged to meet appellant the following day (the 9th) at the Casa Blanca road-house at about 4 p.m. According to Lipchin, he and appellant met at the road-house at the appointed time. Lipchin had diamonds in his possession, which he showed to appellant. Although Lipchin initially said that the value of the diamonds which he exhibited to appellant at the road-house was the sum of R16.900, it appears

5/.....from

from his evidence given at a later stage (but still in chief) that the value was R16.100. That this must have been so appears from evidence as to what occurred at a later stage when, according to Lipchin, appellant signed a document detailing the diamonds he took to show to Arsenis' father at the President Hotel in Johannesburg. The relevant passage in his evidence reads as follows, "Yes? ..... And just before he had got out of the car and he had signed the appro, he said to me 'Haven't you got anything more?' So I said to him 'Well, I will have a quick look in my wallet', and I took out a 1.20" (i.e., carats) for R800.

And was that the lot, bringing the total to? .... R16.900."

From his evidence it appears that he handed over 24 diamonds (one of which was set in a ring) to appellant.

I revert to Lipchin's evidence as to what happened at the Casa Blanca road-house. His evidence in chief reads as follows:

> Yes? --- And he said that he had got to meet Mr. Arsenis's father at the President Hotel or somewhere about there, and that I should take him to town. I said 'I would like to go with you'. He said it would be better if he went alone. He only wanted it for a short while. So I arranged - he convinced me that he

would only need it for about an hour, and I arranged to meet him an hour after I dropped him at the President Hotel in town. Just before I dropped him I said 'Then we must write these diamonds and the values down on a slip of paper or anything', and I asked him if he had a piece of paper. He gave me a piece of paper.

Where did you do the writing? --- In the motor car.

Where? --- Just before I dropped Mr. Seitz.

Yes, but where? --- In town.

Will you look at this document, Exhibit A? In whose handwriting is it? --- This is my handwriting".

I will at a later stage deal with the significance of this document (Exh. 'A.'). It consists of an irregularly shaped scrap of plain paper, which had obviously been torn from a larger sheet. Lipchin explained that at that stage he did not have available the type of book normally used by dealers when diamonds are handed over to agents or prospective purchasers on approval. He had, in any event, intended accompanying appellant to Arsenis, and did not contemplate that he would part with possession of the diamonds. It was only after appellant had indicated that it would facilitate negotiations if Lipchin were not to be present, that it was agreed that the diamonds would be handed over to appellant. The details concerning the diamonds (i.e., weight, number and price) were noted on Exhibit A in the motor car. It is of some significance that after the

details concerning 23 diamonds had been entered, the several prices were totalled and the figure of R16.100 was entered. Thereafter follows a further entry, relating to a diamond of 1.20 carats priced at R800, bringing the total value of the 24 diamonds to R16.900. This total is, however, not reflected on Exhibit "A". Immediately below the last entry appears the following, "Taken By R. Sykes from Louis Lipchin on appro". Lipchin stated in evidence that appellant signed the document in his presence in the motorcar. A signature appears in the bottom right hand corner of Exhibit A. It was not written horizontally across the paper, but perpendicularly to the bottom edge thereof. It is common cause that a police handwriting expert was unable to state affirmatively that the signature was that of the appellant. Lipchin stated in evidence that he entered the details appearing on Exhibit "A" on the remaining portion of the sheet from which the exhibit had been torn, and gave it to appellant. I might mention that of the 24 diamonds said to have been handed to appellant, 6 are individually itemised on Exhibit "A". The remaining 18 diamonds are itemised as follows, firstly, 3 of approximately 1 carat each priced at R900 (for the lot) and,

8/.....secondly,

secondly, 15 stones priced at R1.200 (for the lot). In evidence Lipchin said that the 15 stones were small diamonds.

Lipchin stated that he dropped appellant at the President Hotel at "approximately half past four, five o'clock", after having told appellant, "Look, I would like to have it as soon as possible. You can have it for about approximately an hour". Lipchin returned to the President Hotel at about 6 p.m. and waited for appellant until about 9 p.m. Appellant did not turn up. Lipchin decided to seek advice from a friend, Reubin Klass, who was also a diamond dealer. Lipchin stated that he knew that Klass had had dealings with appellant and might help him to get hold of appellant. Lipchin telephoned appellant's home, and later that same evening went there, where he spoke to appellant's wife. Appellant was, however, not at home. Lipchin was asked why he did not report the matter to the police after speaking to appellant's wife. He replied, "I gave Mr. Seitz a chance to come back to me or call back to me". He stated that he visited appellant's home "practically every night" thereafter, but never found him in. At about 6.30 a.m. on the Friday of the following week (i.e., on 17 October),

Lipchin again visited appellant's home, and saw him for the first time since they parted company at the President Hotel on 9 October. As to what happened on that Friday morning, Lipcin testified as follows in chief:

> "Where did you see him? --- At his home.
>
> At what time? --- It was round about half past six in the morning.
>
> What did he say? --- Well, I went in there and I said to him 'Well, what has happened?' He said that he got taken on by some bloke in Cape Town and I said to him 'Look, I am not interested. I want my diamonds back, otherwise I will report the matter to the police'.
>
> Yes? --- I then telephoned Mr. Klass to come along and witness this.
>
> Did Mr. Klass come? --- Mr. Klass arrived.
>
> Yes? --- Mr. Seitz said to me that I shouldn't worry, he'll give me R15.000, R20.000, R30.000. I must hang on. I said to him 'Look, if I don't get my diamonds back tomorrow, I am going to the police'. He wasn't concerned. He went to get dressed and left us just standing there, and we went, Mr. Klass and myself. We just went away afterwards.
>
> Why were you not prepared to take the R20.000, R30.000? --- Well.....
>
> That he offered? --- I didn't say I wasn't prepared to take it to him. I said 'I am not concerned about the money. I would like my diamonds back', because I didn't believe the man had been caught with them.
>
> What did he say about Arsenis? --- The conversation was more that he had got caught by somebody in Cape Town, that they already caught one of the men that had caught him, and that nobody was going to take him on and everything will be alright. I was already fed-up after a week of running after him."

10/.....The

The following morning (Saturday,18 October) he reported the matter to the police and made a statement to Lt. Marais. It is common cause that appellant was arrested that evening. After having been kept in custody for some days, appellant was released on bail. A preparatory examination was instituted.

Lipchin stated that he saw appellant on several occasions after he had been released on bail, both at appellant's home and also at the Norwood Garage. As to the conversation between them on those occasions Lipchin said, "He kept on wanting to make me feel that I would get my diamonds back and everything would be alright, and all I had to do was drop the charges". He also said that he understood from appellant that somebody "had taken him on in Cape Town" and that he had lost possession of the diamonds. Lipchin discussed the matter with Lt. Marais, who gave him a tape recorder, to be used if there should be further discussions between Lipchin and appellant. When he was asked why the tape recorder was obtained, Lipchin replied, "Because he spoke to me freely, admitting that my diamonds were safe and that I would get them back if I dropped the charges , that I would get them back almost

11/.....immediately

immediately and I wanted this down on tape". Lipchin stated that he thereafter recorded two conversations with appellant, once at the Norwood Garage and subsequently after they had visited a Mr. Jooste (who later gave evidence for the State). Transcriptions of these recordings were handed in at the trial. I will hereafter deal with the weight of this evidence.

It is an appropriate stage to deal with Lipchin's evidence regarding the visit to Jooste which took place immediately prior to the second recording of a conversation between Lipchin and appellant. It appears that they met by chance one morning at the Norwood Garage, and that appellant suggested that they should visit Jooste, who was a friend of appellant, and one who might assist him financially. According to Lipchin there was a frank discussion with Jooste as to the reason for the visit, namely, that Jooste would assist appellant financially. Nothing came of this discussion, and Jooste suggested that they should settle the matter themselves. Before leaving the house, Lipchin excused himself and went to the toilet where he switched on the recorder, which was kept in his jacket pocket. Lipchin stated that he and appellant sat in Lipchin's

> "It came about by me having these conversations with Mr. Seitz, and I had mentioned it to the police and I said to them 'I am sure that if I meet Mr. Seitz again, we'll discuss the same matter again'. So he said 'Well, we can have it recorded. Can you get it recorded?' I said 'Yes, I think I can".

It can be inferred from this evidence that the idea to use a tape recorder may have originated with the police and not with Lipchin. It was put to Lipchin that appellant would deny that he had conversations of the nature appearing from the transcriptions on either of the occasions in question. Lipchin's evidence that he saw and spoke to appellant on several occasions was, however, not questioned. The cross-examination is somewhat equivocal as to what topics were discussed on those occasions. Lipchin said that these discussions were usually carried on in an atmosphere of friendliness, although he did indicate to appellant that he was upset about what had happened. Although the possibility that tape recordings could be tampered with was raised in the cross-examination of Lt. Marais, the matter was not broached in the cross-examination of Lipchin at all.

In regard to the arrangement between Lipchin and appellant before they parted company at the President

Hotel, the following appears from the record:

> "Well now, what was the arrangement between you and the accused if the sale took place? What was he to be given as a consideration? --- We didn't come to any final arrangement. The whole idea of it was that he was going to show these diamonds that afternoon for half an hour after, you know, discussing it and saying it had to be alone with him, and after that I was supposed to meet him and discuss it further. He would give me my stones. In other words, I did not expect the deal to go through or anything. There was going to be a show of diamonds. It is not easy for somebody to buy a volume of diamonds like that in half an hour.
>
> And then if they were sold, what was to be the accused's reward? --- That we could have discussed afterwards.
>
> So there was no discussion at all? --- There was no real discussion on what percentage or anything, or what he was going to ask above those prices, I didn't know. You see, that is why possibly he wanted to go alone too. But he would have to come back to me and said 'Look, you want R16.900. I can get R20.000'. Well, then I would have asked the customer for R20.000 and given him his - well, it is his commission or his percentage".

Lipchin admitted that he had offered to pay a reward of R1.000 to any person who might give information leading to the recovery of the diamonds (which were not insured, so it appears).

Lipchin was cross-examined in regard to a document which Lt. Marais showed to appellant at the time of

his arrest. He explained that he had handed over to the police a printed approval slip which he had obtained from Klass. He had entered the details contained in Exhibit "A" in this slip, which fortuitously bore the carbon imprint of a signature which was admittedly that of the appellant. Lipchin said that he gave this document to the police on the Saturday morning because he had it "on him" at the time. He also wished to acquaint the police with the conditions printed on the form in terms of which diamonds are handed over on approval to an agent or prospective customer. Lt. Marais noticed this irregularity concerning the signature and intimated that he required the original document. In the result Exhibit "A" was given to Lt. Marais on Monday (20 October). After Klass and Lt. Marais had testified, Lipchin was recalled for further cross-examination. It then appeared that the document which Lipchin had handed to Lt. Marais on the Saturday, had been returned to him and had been destroyed because "it was a copy and not of value". It was suggested to him that he used the form bearing the carbon imprint of appellant's signature in order to mislead the police. This was denied. He also stated that he did not have Exhibit "A" on him when he went

to report the matter to the police on the Saturday morning.

" the conclusion of the cross-examination

it was put to Lipchin that a pellmi would not dispute meeting

[illegible] at the Flying Dutchman café on 3 October, nor that the two

of them [illegible] thereafter went to the Clean Machine room-bound.

It was put to him that he then showed Isanie fifteen small

stones. Lipchin's reply reads as follows:

"That is possible," I had nothing of real

consequence. I had to show him something. Possibly I did. I

won't deny that." It was then put to him that he gave these

fifteen stones to appellant on a price of R900. Lipchin denied

leaving any stones with appellant on 8 October. It was put to

Lipchin that appellant would say that he paid the R900 on "the

next day or a day or two later". Lipchin denied this. It was

also put to Lipchin that appellant would deny that he (Lipchin)

and Klaas were at appellant's house on Friday, 17 October.

Ruskin Klaas, a diamond dealer, gave evidence

to the effect that he was on friendly terms with appellant and

Lipchin, both of whom he had known for a long time. On several

occasions prior to October 1991 he had transacted business with

17\.....appellant

appellant involving diamonds being given to the latter on approval. Reference was made to two transactions, namely, on 24 September 1969 and 3 October 1969, when two parcels, valued at R18.400 and R1.200 respectively, were given to appellant on approval. These diamonds were not sold and were returned to Klass. He had had "no trouble" with appellant. He stated that Lipchin came to his house "one evening late" and that the latter was "very upset". He understood that Lipchin was upset "because he was supposed to meet Mr. Ralph Seitz and the party didn't turn up". He also stated that on that occasion Lipchin showed him Exhibit A. In his evidence he stated that he recognised the signature on Exhibit "A" as ~~that~~ being that of appellant. Some time after the visit, early on a Friday morning, he recieved a telephone call from Lipchin, as a rsult of which he went to appellant's home. As to what happened after his arrival, Klass testified as follows:

> "What happened there when you got there? --- Well, when I got there Mr. Lipchin was very upset and agitated. We still asked him what happened to the goods.
>
> What did you ask the accused? --- 'Mr. Seitz, what happened to the goods'?
>
> What goods? --- Well, we were referring to diamonds.

What diamonds? --- Well, I don't know. You know, that's how we speak and we were referring to just diamonds.

But now, what did the accused say? --- Well, he told Mr. Lipchin not to worry. If he's got to pay him R10.000, R15.000 or R20.000, he would pay him.

Yes? Did he say what had happened to the goods? --- Well, he said something about somebody took him on in Cape Town or something.

Yes? --- And we were only there a few minutes, maybe five, ten minutes, and then the accused left and Lipchin left, and ....

What did he mean by somebody had taken him on in Cape Town? --- Well, that's all he said. We didn't ask further questions.

How did you understand that? --- Pardon?

How did you understand it? --- Well, it was very difficult to make out. You know I just came to listen. Mr. Lipchin was very upset when I arrived. He had told me that he had given Mr. Seitz a parcel of diamonds for R17.000, which he never ever received back, and he wanted me down that morning to hear what Mr. Seitz said".

In cross-examination Klass' evidence in regard to his identification of appellant's signature on Exhibit "A" was called into question. His attention was, in the first place, directed to a signature on another exhibit (Exhibit "B"), which had reference to the first transaction between appellant and Lipchin, and which was admitted to be that of appellant, and asked whether he agreed that that was appellant's signature. Klass answered in the affirmative. This was his evidence at the

preparatory examination. He was then referred to evidence he gave at the preparatory examination in regard to the signature on Exhibit "A". It had been put to him in cross-examination, "I think you will agree with me it doesn't bear any resemblance to his signature on Exhibit B?" Klass' reply at the preparatory examination was, "I think I would agree. It simply doesn't look like his normal signature". (I have italicised 'normal"). He was later asked (at the trial), "Will you mind explaining to me this change of front in your evidence today, when you denied in the court below that it was the accused's signature, and you now affirmatively say it is?" (My italics). Klass replied, "Well, according to the rest of it, it looks exactly the same. It looks as though it was only pushed into the corner of the one." (i.e., Exhibit 'A"). Klass was further cross-examined in regard to his identification of appellant's signature, and it was put to him, "So when you said that this bears no resemblance to the accused's signature, that is exactly the same as saying it is the accused's signature?" The cross-examiner overlooked that Klass had not used the words ascribed to him, but had only said at the preparatory examination that the signature on

Exhibit A "doesn't look like his normal signature". (My italics).

Klass was also closely cross-examined as to the use by Lipchin of the approval slip which was handed to the police on the Saturday morning (18 October). He said that Lipchin asked him for the slip in order to have "a record" of the transaction with appellant. It was suggested to Klass that he co-operated with Lipchin in order to produce a misleading document. This was denied. Klass was unable to explain satisfactorily how the carbon imprint of appellant's signature came on to the otherwise blank form used by Lipchin. Klass said that although he could not be sure about the date on which Lipchin wrote the details on this blank form, it was his impression that it "might have been done a day or two before we went to see him". (i.e., before Friday, 17 October). Klass was recalled at a later stage in order to produce the book from which the slip used by Lipchin was obtained. This book, which was handed in as an exhibit, contains printed forms bearing Klass' name and address, etc. There is printed on each form the terms and conditions upon which diamonds are given to agents or prospective

customer. The forms are so numbered that an original and a copy bearing the same printed number may be used to record a transaction. The original document (e.g., numbered 101) could be handed to a prospective customer, whilst the carbon copy thereof (also numbered 101) would be retained in the book for record purposes. The first page in the exhibit is numbered 101, and refers to a transaction dated 24 January 1965. The latest transaction recorded is on form number 191, dated 7 January 1971. On paging through this exhibit, it becomes apparent that it cannot be said to be an accurate record. It abounds with material for any eager cross-examiner. There are numerous instances where both the original slip and the copy thereof are missing from the book. In some instances both the completed original and the copy were retained in the book. In other instances the "copy" retained in the book is not a carbon imprint of an original, but a form completed and signed with a pen as if it were the original document. The book itself provides ample evidence of a slovenly, but not necessarily dishonest, practice. This conclusion does, of course, not by itself negative the suggestion (denied by Klass) that he was a willing party to the suggested

22/.....attempt

attempt by Lipchin to mislead the police by using the form bearing the carbon imprint of appellant's signature.

Klass admitted in cross-examination that he had had further transactions with appellant after 9 October 1969, and that he had trusted him notwithstanding what Lipchin had told him. As to Lipchin's visit during the evening of 9 October, it was suggested to him that it was on that occasion that he first heard of the alleged theft of the diamonds. Klass' reply is, in my opinion, of some significance. His answer reads, "That is the night that I heard not actually that it was stolen or anything, but that he was supposed to meet Mr. Seitz and Mr. Seitz didn't turn up". He also stated that he had knowledge of the fact that during the week following on 9 October Lipchin "was looking for Mr. Seitz".

In re-examination Klass dealt with the question of the recordings which Lipchin claimed to have made of conversations with appellant. He said that he heard portion of the recording. He stated that the voices "definitely sounded like Mr. Seitz and Mr. Lipchin". He was asked whether he had any doubts about it. He replied, "I don't think so. That I am

23/.....quite

quite sure I could hear distinctly". Klass was asked whether he had ever questioned appellant privately about Lipchin's complaint. The evidence which Klass gave in this connection is, in my opinion, of importance in regard to the question whether he may have conspired with Lipchin to give false evidence. He testified as follows:

> "But Mr. Klass, if you were on such good terms with the accused, even up to last year when you had dealings with him? -- Yes.
>
> Did you ever question him privately as to what had happened to Mr. Lipchin's diamonds? --- I did ask him about it.
>
> What did he say to you? --- He always told me that he didn't do anything of the sort.
>
> He didn't do anything? --- He didn't do anything. He wouldn't admit anything as far as the diamonds were concerned. He just evaded the question and I left it at that. We didn't ask again.
>
> You mean did he admit or deny that he had ever obtained diamonds from Mr. Lipchin? --- He denied most of ~~it~~ the time that he took diamonds from Mr. Lipchin.
>
> Did you believe him? --- Well, it wasn't for me to believe or not to believe. I sort of felt sorry for Mr. Lipchin and I might have approached him once or twice and asked him, but we never got any further and I left it at that".

Counsel for appellant was granted leave to cross-examine Klass on his evidence given in re-examination regarding the recordings. He reiterated his opinion that he

24/.....could

could identify the voices of Lipchin and Klass. He stated, "..... but I could distinguish the voices quite easily". Klass nevertheless quite readily conceded that he might have been influenced in his identification of the voices by Lipchin's statement to him that they were those of appellant and himself.

Counsel for the State was thereupon granted leave to question Klass in regard to the contents of the transcription, and he drew attention to the repeated use of obscene expressions by the person whose voice Klass had identified as being that of appellant. He stated that appellant "occasionally" used similar language in ordinary conversation with him. In further re-examination he conceded that "this kind of obscene language is used by a lot of people".

Next I propose dealing briefly with the evidence of the owner of the Norwood Garage, a Mr. Myers, who was a frind of Lipchin and knew appellant "as a customer". He heard from Lipchin that he had had "trouble" with appellant. A few days later he saw appellant at the garage, and appellant then told him that "he was going to Cape Town" and that "he will get the goods back". Appellant showed him two air tickets.

He also said that somebody took the diamonds from him. Myers said that he told appellant that "he should give Mr. Lipchin back the diamonds that he took from him and everything would be sort of forgotten about". When Myers was asked whether appellant had volunteered the statements or made them as a result of questioning, he replied, "Well, I can't remember exactly, you know, if I questioned him. It just came out in talking". He also stated that he heard a recording of a conversation, and identified the voices of Lipchin and appellant.

Under cross-examination it emerged that Myers' evidence regarding the tape recording was given for the first time at the trial before the Court a quo. When asked why he had not mentioned this before, either to the police or at the preparatory examination, he replied, "Well, they didn't ask me if I heard a tape recording or not". He also stated that he "might have known" about the reward" of R1.000 offered by Lipchin, but that he didn't think in terms of earning that reward. He also stated that even after appellant knew that he (Myers) was a State witness, appellant discussed the case with him. In re-examination, in response to a leading question,

26/.....Myers

Myers stated that the question of the tape recording was first raised with him by counsel for the State.

A witness, Mr. A.P. Kondes, stated in evidence that he had business dealings with appellant "early in September" 1969. Appellant had suggested to him that he could earn commission if he were to find customers for diamonds. He knew "a person by the name of Matthysen", and had visited him on about three occasions. On one occasion, "early in September", he (Kondes), appellant and one Jackie James visited Matthysen for the purpose of selling diamonds to him. The diamonds had been obtained on approval by appellant. He knew that he bought a motor car on 10 September, and the visit to Matthysen took place some few days later. Matthysen handed the diamonds to his wife who took them out of the room. The diamonds were brought back, and they were told that they wanted too much for them. He said he thought the diamonds were worth a sum "in the hundreds", about R800. He was shown a list of diamonds, said to be the diamonds (approximately 20 in number) which were shown to Matthysen on 14 October 1969. He denied being involved in a transaction concerning those diamonds.

27/.....In

In cross-examination he gave evidence to the effect that the police had acted improperly in taking a statement from him. In this statement he had referred to a conversation between Lipchin and appellant in his presence, during the course of which Lipchin said to appellant that he (appellant) "cost him a further R2.500 which he had to pay out to the police". The police officer taking the statement said at that stage, "Now I've got you. I'm going to lock you up". The uncompleted statement was torn up. Kondes was, however, not locked up, but told to go home. At a later stage a statement was taken from him at his office. In re-examination he stated that the policeman was a sergeant, who assisted Lt. Marais in the investigations, and that he could point him out. He knew him as "Willie". At the request of counsel for the State Kondes stood down, so as to enable the sergeant in question to attend the trial.

When Kondes was subsequently recalled, he was asked in what motor car he, appellant and James had driven to Matthysen's home. He said that it was a two-door 1967 Pontiac Le Mans motor car. The colour he described as "creamy white

28/.....with

with a black top". He had never lent this car to appellant.

Detective Sergeant Visser was called into court, and Kondes identified him as the person who took the first statement from him.

In cross-examination it was put to him that a witness (Scherman), who had given evidence prior to Kondes' recall, had stated that he (Scherman) was at Matthysen's home on 14 October in order to value diamonds which had been offered to Matthysen. Outside the house he had seen a Pontiac motor car, the description of which fitted his (Kondes') car. Kondes repeated his denial that he was there on that date. In re-examination Kondes' attention was directed to a passage in the transcription of the alleged recording of a conversation between Lipchin and appellant, from which it appeared that appellant had been concerned in a deal with him (Kondes) which resulted in appellant landing in difficulties. Kondes said, "No, I know nothing about things like this".

In reply to questions put by the Court, Kondes stated that he "came across" three cars in Johannesburg which were identical with his as to make, model and colouring.

He stated, further, that on each of the three occasions upon which he visited Matthysen, the diamonds were furnished by appellant. It was only on the first occasion, however, that appellant accompanied him, because he (Kondes) was then "a complete novice". Thereafter he visited Matthysen on his own.

It is a convenient stage to refer to the evidence of Matthysen and Scherman as to what happened at the former's home during the late afternoon of 14 October 1969. They both had cause to remember the date; later that evening they were arrested after they had been trapped in connection with an illicit diamond buying transaction. Matthysen stated in evidence that at about 5 p.m. three persons came to his home to offer diamonds (cut and polished stones) to him for sale. He could not remember their names and was unable to identify them. He is apparently nearly blind. The appointment with him had been arranged by telephone on the previous day at about 2 p.m. He had requested Scherman to come to his house at about 5 p.m. in order to value the diamonds for him. Scherman did not enter the lounge where they were, but had upon his arrival walked down the passage to the kitchen. Matthysen took the

30/.....packets

packets of diamonds to Scherman in the kitchen. On Scherman's valuation he decided not to buy, because he considered the price to be excessive. The three persons left. His wife was not present. He said that, subject to correction, the diamonds were worth from R10.000 to R15.000. He denied that three persons had visited him during September and offered him four stones for R800. He said that nobody had visited him prior to 14 October to sell diamonds.

Scherman, who was at the relevant time a licensed diamond cutter and valuer, confirmed that he was at Matthysen's home during the late afternoon on 14 October 1969. Upon arrival he saw a Pontiac two-door motor car with a Johannesburg registration number, off-white in colour with a black roof, parked in the drive-way leading to Matthysen's garage. He walked along the passage to the kitchen without seeing who the prospective sellers were. Matthysen brought packets containing diamonds to him in the kitchen. The weights of the stones were noted on the packets. He made a note of the diamonds and proceeded to value them. In the absence of his original note (which had been mislaid) he was shown a photo-

static copy thereof, which he identified as being correct. In valuing the diamonds he noted on this list particulars regarding the weight, colour, purity and valuation of the several stones (20 in number). According to his valuation the parcel was worth R19.950-80. Scherman was then asked whether the 20 stones valued by him bear comparison with the stones allegedly handed over by Lipchin to appellant on 9 October. He compared the items on Lipchin's list with that on his list, and noted that there were missing in the parcel valued by him one 1.20 carat and three 1 carat diamonds. As to the comparison between the 20 diamonds on his list and 20 of the 24 diamonds on Lipchin's list, he testified as follows in examination in chief:

> "Nou maar wat ek graag wil vir u vra is dit. U sê u het die gewigte op die pakkie gekry? --- Ja, U Edele.
>
> Sou u sê daar is n noemenswaardige ooreenkoms tussen mnr. Lipchin se lys en die lys wat u gemaak het? --- Ja, U Edele.
>
> Kan dit dieselfde stene wees, of nie dieselfde stene nie? --- Dit kan moontlik dieselfde stene wees.
>
> Nou maar in die handel, kry n mens.....? --- Wel, ~~om so n samestelling van stene bymekaar te kry, die-~~ selfde samestelling weer bymekaar te kry, is baie onwaarskynlik.
>
> U meen dieselfde gewigte? --- Ja, en kleure en suiwerhede".

Scherman's evidence was not subjected

32/.....to

to cross-examination.

I have already referred to a visit by Lipchin and appellant to the home of a Mr. Jooste, and I propose dealing briefly with Jooste's evidence. He described himself as a turf accountant employed by a bookmaker, Mr. Soggot. His home is some 100 yards from the Norwood Garage. He knew appellant, and had lent him small amounts of money at various times. He met Lipchin for the first time when appellant and Lipchin visited him one morning at his home at about 8 o'clock - he was still asleep when they arrived. He took them into the garden where they sat at the swimming-pool. He ordered coffee. As to the conversation which took place he testified as follows in examination in chief:

> "Now what did the accused say to you? --- Ralph said to me 'When I borrow money I'm good, ain't I?' Then I said 'Yes'.
>
> Yes what did they talk about? --- Well, they were muttering, the two of them there, and then he said 'I want to borrow money'. Then I said 'Well, you're good for money. It all depends on the amount'. He said 'A large amount'. I said 'What do you want a large amount of money for?' I don't know if it was Lipchin or Ralph who said 'For diamonds'. I then replied 'Diamonds are for Oppenheimer'. It was enough for me and I let them have their coffee and I went back to bed. It being my day off, you see I sleep late.

33/.....And

And what did you say about the diamonds? --- No, there was no more on that issue after that.

Did you take a special interest in what they were saying? --- No, Sir".

He spent about six to ten minutes with them, took his leave and returned to bed.

In cross-examination he stated that appellant was fully aware of the fact that he was not in a position to "lend him thousands". The substance of Lipchin's version as to what was said was put to him and denied. He recalled that when appellant entered the house he asked him (Jooste) whether he had "a monkey" (i.e., R500) on him. He denied that appellant had told him that he needed R500 in order to buy diamonds which he could sell so as to obtain money for his defence. He concluded his evidence with the statement, "I wouldn't listen when they started with their diamonds, because I run for my life when they mention 'diamonds'".

In so far as the police evidence is concerned, I propose referring only to that given by the investigating officer, Lt. Marais. Detective Sergeant Visser was called to testify in regard to certain issues (e.g., in regard to the taking of statements from Kondes and Miss. Ferreira), but I find it unnecessary to deal with those issues in this judgment.

Lt. Marais saw Lipchin for the first time on Saturday morning, 18 October, and took a statement from him. On Monday (20 October) Lipchin produced the document, Exhibit A. Appellant was arrested late that Saturday evening and brought to the police station (John Vorster Square) where Marais interviewed him. Marais informed appellant of the charge, namely, the theft of R16.900 worth of diamonds from Lipchin on 9 October, and gave him the customary warning. He denied the charge and, at first, declined to make a statement. He was then asked whether he was prepared to answer certain questions. Appellant said he would do so, provided it was not put in writing. Marais asked appellant where he was at 4 p.m. on 9 October 1969. Appellant replied that he was not in Johannesburg on that day, but in Kimberley. Without further questioning, appellant volunteered information that he left Johannesburg for Pretoria on 7 October. Upon being questioned about whom he went to see in Pretoria, appellant said that he only remained there for half-an-hour and saw nobody. From there he drove to Kroonstad to discuss the purchase of a motor car with a Mr. Jurie Botha. He was, however, not at home. He then proceeded to Douglas,

35/.....where

where he was joined by a woman (whose identity he did not want to disclose). The two then went to Kimberley where they spent the night with a Mr. and Mrs. Minnie. He was driving an Oldsmobile motor car. In the presence of appellant the Minnies stated that he and a woman spent the night of 10 October in their home. Appellant did not comment on this. On the way back to Johannesburg appellant told Marais that he had lied to him about picking up a woman in Douglas. The woman who was with him at the house of the Minnies, was a married woman from Johannesburg, whose identity he did not wish to disclose.

Marais mentioned that when he showed Exhibit "A" to appellant, he denied that his signature appeared on the document. He also confirmed that handwriting experts could not positively identify the signature on the exhibit. ("..... kon nie die handtekening positief identifiseer nie"). Marais also stated that on the Saturday evening appellant denied ever having had any transactions with Lipchin.

In his evidence Marais reverted to the visit by appellant to Kimberley, and said that in appellant's presence Mr. Minnie said that he arrived in a Pontiac G.T.O. motor car

with a Pennsylvania registration number. It was later ascertained that the motor car belonged to a Mr. Gerry Arsenis, who had since fled the country. At this stage he also mentioned that the person Jackie James, mentioned by Kondes, had also fled the country.

Marais said that on Saturday (the 18th) Lipchin produced the printed approval slip bearing the carbon imprint of a signature said to be that of appellant. Upon being questioned, Lipchin explained to Marais how this form came to be used by him. Marais then requested production of the original document said to have been signed when the diamonds were handed over to appellant.

In so far as the tape recorder is concerned, Marais stated that Lipchin made a report to him towards the end of November, whereupon he gave him the recorder and instructed him in its use. It remained in Lipchin's possession for about two weeks to a month. He listened to the first recording but decided that it was not sufficiently clear. The recorder was handed back to Lipchin, who finally returned it towards the middle of December.

37/.....Marais

Marais stated that as a result of reports made to him by Lipchin, he approached Myers and Jooste for statements. He approached Klass as a result of the information on the approval slip handed to him on the Saturday morning. Marais also stated that he could not remember who gave him the information which led him to obtain statements from Matthysen and Scherman. He first saw them the day after appellant had been committed for trial. The preparatory examination was re-opened to lead their evidence. The list which Scherman made on 14 October in the kitchen of Matthysen's house only came to Marais' notice when he examined the record of the trial at which Scherman appeared as an accused.

In cross-examination Marais made the admission already referred to earlier, i.e., that it was possible to tamper with recordings. He also said that Klass is mistaken where he claims to have listened to the recording after 23 January 1970. He stated, further, that Myers is incorrect where he stated in evidence that he had heard certain passages of a recording made at the garage. The passages referred to by Myers was in fact, on Lipchin's version, not ~~made~~ recorded at the garage,

but later in Lipchin's motor car outside Jooste's home.

He admitted that the approval form which Lipchin had handed to him on the Saturday morning was shown to appellant that evening after his arrest. Appellant admitted that the signature was his.

Appellant testified in his own defence, but did not call any witnesses. In his evidence appellant admitted that he had telephoned Lipchin on 8 October and told him that he "had a prospective buyer for a large amount of stones". By arrangement they met at the Flying Saucer café after Lipchin's return from the airport. Appellant and Lipchin, followed by Arsenis, drove to the Casa Blanca road-house, where Arsenis joined them in Lipchin's motor car. Arsenis mentioned that he wanted a large parcel of diamonds(R40.000 to R50.000 worth) for his father. Lipchin said that he did not have diamonds on him for such a transaction. Lipchin said it would take him a couple of days to get hold of such a parcel. Lipchin then produced fifeeen small stones, but Arsenis said his father would not be interested. Lipchin asked appellant whether he knew of anybody who might buy the stones. Appellant said that he would

try to see what he could do. He took the diamonds and a price of R900 was fixed. The following morning he telephoned Lipchin who then came to his (appellant's) home where the R900 was paid. No document was signed on the 8th to record the transaction, and no appointment was made to meet on the 9th as was said in evidence by Lipchin. There was no further meeting between them on the 9th after the meeting at appellant's home where the R900 was paid. He denied knowledge of Exhibit "A" and said that the signature on the document was not his. Appellant denied that Lipchin and Klass visited him at his home on the morning of 17 October. He had never made admissions to either Lipchin or Klass.

He stated that after his arrest on the Saturday evening (18 October) Lt. Marais showed him the approval slip which bore the carbon imprint of his signature. He admitted that it was his signature. When he was shown Exhibit "A" a few days later, he denied that the signature thereon was his. He stated that he made a false statement to Lt. Marais on the Saturday evening "because I saw my signature on this piece of paper, and I was frightened". He said he "couldn't work it out".

40/.....He

He lied about the earlier transaction with Lipchin involving a stone worth R5.000 because he was "confused at the time". He returned from Kimberley on 13 October, during the late evening.

He admitted being a customer of Myers at the Norwood Garage, but did not know him socially. He made no admissions to Myers, and knew that Myers was to give evidence for the State.

He denied that he was at Matthysen's home on 14 October. He said that on 12 September 1969 he, Kondes and "another man" went to Matthysen with a parcel of diamonds he had obtained from Klass on that same day.

Appellant admitted that he and Lipchin visited Jooste one morning, after they had had by chance met at the Norwood Garage. Appellant was asked whether he and Lipchin were on friendly terms at the time. Appellant replied, "He spoke to me, I mean, there was the case pending. I didn't have anything against him really". He told Lipchin he was going to visit Jooste in order to borrow money. Lipchin asked whether he could accompany him, because his brother plays bowls with

Jooste. After their arrival at Jooste's home, appellant asked him whether he could lend him R500 for his defence. Jooste "threw up his hands in the air and said, 'Please! R500, what do you think I'm a millionaire or something'". Appellant said he required the money to buy diamonds, whereupon Jooste said "Leave me alone. Diamonds are for Oppenheimer". Appellant was asked to explain why Jooste's version as to what was said differ from his. He answered that Jooste "must have forgotten about it". Appellant denied Lipchin's evidence as to what was discussed.

Appellant denied that he had conversations with Lipchin of the nature said to have been recorded by the latter on the occasions in question. At this stage counsel for appellant suggested to the Court that the tape be played, so that the Court would be in a position to decide whether it was appellant's voice that had been recorded by Lipchin. After discussion, Cillié, J.P., decided to listen to the recording. In regard to this the record reads as follows. (Mr. Zwarenstein was appellant's counsel and Mr. Liebenberg appeared for the State).

"(TAPE-RECORDING IS PLAYED).

MR. ZWARENSTEIN: My Lord, one of the witnesses - I

 can't

can't remember who it was , for the moment - said that he could clearly hear this tape. He could clearly make out what was said by the voices without having to put it to his ear. Now, my Lord, that is not the view of the defence. I don't know whether your Lordship would just.....
THE COURT: This is quite easy to hear.
MR. LIEBENBERG: Especially if one holds the - next to one's - it's easy to follow.
(RECORDING IS DISCUSSED).
MR. ZWARENSTEIN: (CONTD).Well, what do you say about the voice there? --- I deny this, my Lord.
Now, it was suggested that this is the sort of language you use. Do you use this kind of language occasionally? --- No, I don't, my Lord".

In cross-examination appellant stated that he did not follow up the discussions of 8 October, because he expected Lipchin to approach him. Lipchin had said that it would take a number of days to collect the diamonds for the Arsenis transaction. He stated that he saw Lipchin on the morning of 9 October to pay the R900. Up to that time there had never been any trouble between Lipchim and him.

Under further cross-examination appellant stated that he went to Kimberley on 10 October in the motor car of Arsenis and arrived back in Johannesburg on 13 October. Without going into details, I might mention that in the course of his evidence relating to the Kimberley trip, appellant

43/.....contradicted

contradicted Lt. Marais' evidence on several points which were never put to Marais.

Appellant stated that he gave the 15 diamonds, which he received from Lipchin on 8 October, to Arsenis as security for the use of the motor car. He went to Kimberley to seek Minnie's advice in regard to a Namaqualand proposition and not to look for a buyer who might be interested in diamonds.

Appellant stated that he had met Kondes, and on one occasion accompanied him to Matthysen's home, but that was on 12 September and not on 14 October.

Appellant stated that he was on good terms with Klass and had had dealings with him even up to July 1970, and was quite unable to explain why Klass should give false evidence implicating him. He also denied having had any discussions with Lipchin at any stage relating to the case.

When he was cross-examined in regard to the visit to Jooste, appellant stated that Lipchin "forced" his company on him. He added, ".....he forced himself wherever I was, he forced himself in". When he was asked why it was necessary to borrow R500 from Jooste to buy diamonds for resale

at a profit, when he could have obtained diamonds on approval from Klass, he stated that there "was a bargain going at the time and the man wanted cash". I might mention that it appears from appellant's later evidence that he made R50 profit in connection with the sale of the 15 diamonds he bought from Lipchin for R900. It was, however, not investigated what profit appellant hoped to make on the resale of the diamonds he was going to buy for R500.

The Court questioned appellant about his transaction with Lipchin involving the 15 small diamonds. The record reads as follows:

> "And on the morning of the 9th you paid him R900-00? --- That's correct, my Lord.
>
> Where did you get the R900-00 from? --- I had money, my Lord. I had a few pounds that I made previous to this.
>
> You didn't sell those diamonds? --- Not at that stage. I sold it at a later stage. I borrowed a few pounds from some people - from my family - I got this money together, and then when I sold it I repaid them back. I only made about R50-00 I think."

I have already referred to the passage in the judgment of Cillié, J.P., where reference is made to the fact that "..... many witnesses were untruthful, outside and inside the court.....". Cillié, J.P., however, proceeded to

to analyse the evidence of the various State witnesses and that of appellant in the light of the criticism which had been levelled against it by counsel appearing for the State and appellant respectively. It does not appear ex facie the judgment that the demeanour of any witness (including the appellant) was of any real assistance to the trial Court in determining their credibility. It appears from the judgment that Cillié, J.P., was fully aware of the need to scrutinise their testimony closely, and indeed did so. In concluding that appellant's guilt had been established beyond any reasonable doubt, the trial Court relied largely on the evidence of Lipchin, Klass and Myers, which it found acceptable notwithstanding valid criticism of certain aspects thereof, the probabilities supporting the State case and the unsatisfactory nature of the evidence given by appellant in regard to the false statements made to Lt. Marais on Saturday evening (18 October 1969).

It was not submitted on appellant's behalf that Cillié, J.P., had misdirected himself in any material respect, and that this Court was, therefore, at large to reconsider the question of the appellant's guilt. It is, therefore, in-

cumbent upon the appellant to satisfy this Court that Cillié, J.P., was [redacted] wrong in concluding that the appellant's guilt had been established beyond any reasonable doubt. The substantial submissions on appellant's behalf before this Court were:

(a) that the evidence of Lipchin, Klass and Myers should have been rejected;

(b) that undue stress was placed by the trial Court upon the coincidence between the items appearing on Exhibit "A" and those appearing on the list completed by Scherman in the kitchen of Matthysen's home on the afternoon of 14 October 1969, more particularly as a serious doubt existed whether the signature on Exhibit "A" is that of appellant; and

(c) that the trial Court erred in drawing inferences adverse to appellant from false statements made by appellant to the police after his arrest.

The first criticism of Lipchin's evidence relates to that which he gave in regard to the tape recording made at the Norwood Garage, more particularly in so far as he said that on that occasion appellant made admissions regarding the transaction in question. It was submitted that this recording was never produced at the preparatory examination, and that Lt. Marais had indicated that he was not interested in the

47/.....contents

contents of that recording. A transcription was only made at a much later stage, and this was an exhibit at the trial before the Court a quo. The recording was apparently not clear, and the transcription of the conversation is somewhat incoherent. Lipchin's evidence that appellant made important admissions during the course of the conversation is certainly not borne out by the contents of the transcription. In my opinion, however, the transcription does contain snatches of conversation which relate, albeit obliquely, to a transaction of the kind deposed to by Lipchin. It must be borne in mind that Lipchin's evidence that appellant made important admissions on that occasion is probably based, not on the recording, but on his recollection of what was said at the time. The evidence indicates that the recording was not clear in the sense, as I understand the evidence, that much of what was said was unintelligible on the recording. Lt. Marais' evaluation of what was said at the time is, on the other hand, based on what he could hear when the tape recording was played back. He was primarily interested in a recording which could be used as evidence in a court, and not in evidence which Lipchin would be able to

give as to his own recollection of the conversation. In my opinion the criticism of Lipchin's evidence on this aspect of the matter is not of any real weight.

It is perhaps a convenient stage to dispose of certain questions which arose in regard to the alleged recording of two conversations between Lipchin and appellant. Although it appears that Cillié, J.P., listened to the recording in court and said that it was clear, he made no express finding as to the identity of the voices in the light of other evidence that they were those of Lipchin and appellant. In his judgment Cillié, J.P., stated: "..... there must obviously have been sufficient opportunity for the complainant to have tampered with the recordings if he wanted to do that. The fact that the recordings were in the possession of the complainant for a substantial time would, I think, mean that the Court ought not to pay the attention to them which it might otherwise do, because there was an opportunity to interfere with them. The Court does not intend giving undue weight to the recordings". In saying that he would not give "undue weight" to the recordings, Cillié, J.P., appears, by implication at any rate, to indicate

that he was satisfied that the voices were those of Lipchin and appellant. If he were not so satisfied, no weight at all could have been given to the recordings. I take it that the reference to "an opportunity to interfere with the recordings" relates to an opportunity of tampering with a recording made of actual conversations between Lipchin and appellant, and not to a tampering in the sense of a recording of a conversation between Lipchin and some person impersonating the appellant. Such a procedure could hardly be described as "tampering" or "interfering with" a recording. In my opinion the weight of the evidence, including the evidence furnished particularly by the contents of the transcription of the second recording and the probabilities support a finding, at least, that Lipchin's evidence is probably truthful where he states that he used the tape recorder on two occasions to record conversations between him and appellant. This brings me to the "opportunity to interfere" with the recordings. This finding is, so it would seem, based on the admission by Lt. Marais in cross-examination that "tampering" was possible, although he had no experience of how it is done. The possibility that he "interfered with"

50/.....the

the recordings was not raised in the cross-examination of Lipchin. In view of the fact that Lt. Marais had to instruct Lipchin in the use of the recorder, it is doubtful whether Lipchin himself had sufficient knowledge of how recordings might be tampered with. It was not put to him that he might have obtained expert assistance. From what follows, it is, in my opinion, not necessary to use the evidence of the recordings to weight the scale against the appellant. I am satisfied, however, that the evidence of the recordings do not furnish any basis whatsoever for criticising Lipchin's evidence.

It was submitted, next, that Lipchin gave "a most unsatisfactory" explanation of why he used a scrap of paper on 9 October to record the transaction forming the subject matter of the charge (i.e., the document, Exhibit "A"). A further submission, that the circumstances surrounding the use by Lipchin of an approval slip from Klass' book are highly suspicious, can conveniently be considered in conjunction with the first-mentioned submission. As to the latter submission, my impression accords with that of Cillié, J.P., namely that Lipchin may very well have improperly used the approval slip in order to impress

the police. The learned Judge-President was correct in regarding this in a serious light, as reflecting adversely on Lipchin's credibility. The first-mentioned submission, however, lacks substance. On 8 October, Lipchin negotiated with Arsenis, who was supposed to be acting for his father. On appellant's version, he was to meet appellant the next day, 9 October, in order to enter into further negotiations with Arsenis. Lipchin stated that it was not his intention to hand over the diamonds to appellant on approval, but to be present at the further negotiations. It was only when appellant insisted that it would be better if Lipchin were not to be present at the negotiations, that the question of handing over the diamonds to appellant arose. Appellant, who had only recently commenced business as a diamond dealer, was not yet in possession of the type of book used in the trade when diamonds are handed over on approval (i.e., the type of book used by Klass). In view of the fact that he did not contemplate handing over diamonds to appellant, it is understandable that it did not occur to him that it was necessary to take with him an ordinary invoice book or even a sheet of paper on which to obtain appellant's acknowledgment of his

receipt of the diamonds.

The appearance of the scrap of paper used to compile Exhibit "A" is also more consistent with Lipchin's version as to the circumstances in which it came to be signed by appellant than with the defence suggestion that it was a forged instrument, unless a higher degree of astuteness were to be ascribed to Lipchin than is manifested by his evidence as a whole. There is other evidence, afforded by Exhibit "A" itself, which to some extent negatives the possibility that Exhibit "A" was forged some time after Lt. Marais had required the production of an original document. It will be recalled that Lipchin stated that after he had handed over 23 diamonds (one of which was set in a ring), and had entered the details thereof on Exhibit "A", the price totalling R16.100, appellant asked whether he had no further diamonds. Lipchin searched in his wallet, and found a 1.20 carat diamond priced at R800, which was given to appellant. The manner in which the details of this diamond were written in on Exhibit "A" is completely consistent with Lipchin's account of how he came to hand it over to appellant. The somewhat squashed appearance of the signature, said to be

that of appellant, in the right-hand bottom corner of Exhibit 'A', is likewise consistent with Lipchin's version of how the document came to be signed in the motor car. There is another rather peculiar feature of Exhibit 'A' which was not pursued in evidence at the trial, namely, the misspelling of appellant's name on the document as "R. Sykes". In the absence of evidence as to how the mistake came about, it is possibly unwise to speculate as to the reason for the mistake. As at 9 October Lipchin had had very little contact with appellant, and it is possible that he may have mistaken Seitz for Sykes. However, assuming Exhibit 'A' to have been forged after 17 October, it appears unlikely in the circumstances that Lipchin would at that stage have been under any misapprehension as to what appellant's name was. It appears at least likely that on Saturday morning (18 October) appellant gave the correct name of appellant to Lt. Marais. There are other circumstances which seem to point against the possibility that Exhibit 'A' was forged. There is, of course, the evidence of Klass that Lipchin showed him Exhibit "A" on the evening of 9 October, when theft was not even mentioned by Lipchin. I shall, however, deal with Klass' evidence at a

54/.....later

later stage. There is, however, another circumstance which, in my opinion, appears to indicate that Exhibit 'A' was probably completed before Saturday (18 October). It will be recalled that the approval slip handed to Lt. Marais on Saturday morning was retained by him, after it had been used in connection with the taking of Lipchin's statement. Unless Lipchin had a very clear recollection of the precise details entered on the approval slip, or a copy thereof, it would have been difficult for him to have forged Exhibit "A" after the Saturday morning. A further question is, assuming forgery, why Lipchin chose to fabricate a document having the appearance of Exhibit "A".

A further submission on behalf of appellant referred to the improbability of the evidence of admissions said to have been made to Lipchin, Klass, Myers and Jooste, in view of appellant's consistent denials to Lt. Marais that he had obtained diamonds from Lipchin. There is force in the submission, particularly in so far as Myers is concerned. It must be remembered, though, that on Lipchin's version appellant had good reason to be frank with him, Klass and even Jooste. The first so-called admission made by appellant was to Lipchin and Klass on the Friday morning (17 October). On the version

55/.. .....of

of Lipchin, supported by Klass, the visit to appellant's home on that morning took place because Lipchin wanted an explanation from appellant as to what had happened to the diamonds. Appellant, whilst admitting receiving the diamonds, gave an explanation of an exculpatory nature, i.e., in the sense that he had lost possession of the diamonds, presumably by trickery. It must also be borne in mind that in so far as Klass is concerned, this was the only occasion on which appellant admitted to him, or in his presence, that he had obtained diamonds from Lipchin on 9 October. I shall deal with Klass' evidence at a later stage. Appellant appears to have been at pains to reasure Lipchin that he had no cause to be concerned and that he would get his money. Lipchin was, however, not satisfied with appellant's explanation, and only then threatened to report the matter to the police if the diamonds were not returned by the Saturday morning. On Lipchin's version appellant, after his arrest, sought to persuade Lipchin to drop the charges against him because that would assist him to obtain possession of the missing diamonds. It was only in that context that appellant made so-called admissions to Lipchin. The admissions allegedly

made to Jooste in Lipchin's presence flowed, on Lipchin's version, from appellant's approach to Jooste for financial assistance so as to enable him to obtain possession of the diamonds. Against this background it is understandable that appellant would not as readily take Lt. Marais into his confidence.

A further submission on appellant's behalf is that Lipchin's version of the visit to Jooste is denied by the latter. The fact that Jooste also disagrees with appellant's version indicates that he was not attempting to shield appellant. In my opinion, Cillié, J.P., correctly summed up Jooste as a witness in saying that he wanted to dissociate himself as much as possible from the matter. His account of the conversation is so condensed that it furnishes scant assistance in deciding between the conflicting versions of Lipchin and appellant. In so far as his précis of the conversation goes, it might even be said to lend some support to Lipchin's version. In my opinion, however, it would be unsafe to use Jooste's evidence in assessing the credibility of either Lipchin or appellant. The visit to Jooste is,however, of some importance in another respect. On Lipchin's version there was good reason for accom-

57/.....panying

panying appellant to Jooste. At that stage appellant was at pains to persuade Lipchin to drop the charges against him. Appellant hoped that Jooste, who had assisted him in the past, might render financial assistance to enable appellant to get out of his difficulties. He, however, required "a large amount" on this occasion. It appears that appellant used the occasion to attempt to impress upon Lipchin that he could trust him (appellant). Appellant's version, that Lipchin "forced" his company on him, ostensibly to meet Jooste because the latter played bowls with Lipchin's brother, is, in the circumstances, highly improbable.

There is further evidence which supports Lipchin's version that Exhibit"A" is a genuine document signed by appellant on 9 October. I refer to evidence relating to the Matthysen transaction. Appellant admitted in evidence that there was an occasion when he, Kondes and a third person visited Matthysen at his home in order to offer diamonds to him for sale. His evidence that this took place in September is supported by that of Kondes (a State witness whose credibility was rightly held by the Court a quo to be suspect). Matthysen

said that there was only one occasion when three persons visited him, and that visit took place on 14 October. Scherman, who was not cross-examined at all, stated that he saw a motor car at Matthysen's home on 14 October, and it is common cause that the description of the motor car fitted the description of a motor car which Kondes owned at the time. Scherman made a list of the diamonds which he valued on 14 October. The list only became available to Lt. Marais during April 1970. On Saturday morning (18 October) Lipchin handed over the approval slip to Lt. Marais which contained particulars of the diamonds allegedly handed over to appellant on 9 October. It was not suggested that these particulars differ from those appearing on Exhibit "A". If it were to be assumed that the coincidence between the particulars on Scherman's list and that on Exhibit "A" could be explained upon the basis that Lipchin had knowledge of the Matthysen transaction, certain questions arise. Why did Lipchin add to his list 4 diamonds not on Scherman's list? A diamond referred to in Scherman's list corresponded with a diamond in Lipchin's list, but one which was not set in a ring. What possible reason could Lipchin have had for this embellish-

ment? This explanation also requires a finding that it was reasonably possible that Lipchin obtained information about the Matthysen transaction at some time after 14 but before 18 October. This ~~possibly~~ possibility was never explored in the cross-examination of Lipchin.

The trial Judge's reliance on the evidence of Klass was criticised by counsel for appellant. It was submitted that an analysis of Klass' evidence gives rise to the possibility that he was motivated by friendship with Lipchin to give false evidence against appellant. It was submitted, firstly, that the evidence of Klass identifying appellant's signature on Exhibit "A" was dishonest. In his evidence in chief he had identified signatures on Exhibit "A" and another document (Exhibit "B") as being those of appellant. In the case of the latter document the signature was admittedly that of appellant. He was taken up on this evidence in cross-examination and referred to what he had said under cross-examination at the preparatory examination. The passage put to him, to which I have already referred, reads as follows:

> "Have a look at Exhibit B. I think you'll agree with me that that is his signature? --- I think

you are right.

Have a look at Exhibit A? --- Yes.

I think you will agree with me that it doesn't bear any resemblance to his signature on Exhibit B? --- I think I will agree.

It simply doesn't look like his normal signature? --- No, not at all". (My italics).

He was further cross-examined (at the trial) and the record reads as follows:

"Will you mind explaining to me this change of front in your evidence today, when you denied in the court below that it was the accused's signature, and you now affirmatively say it is? --- Well, according to the rest of it, it looks exactly the same. It looks as though it was only pushed into the corner of the one.

Why did you say that at the Magistrate's Court? Why did you say or agree with Mr. Oshry that it did not bear any resemblance to the accused's signature and that it was not the signature in your books? --- I can't recall. I can't answer this".

It is to be noted that at the preparatory examination Klass was asked to compare the signature on Exhibit "A" with appellant's "normal" signature, which appeared on Exhibit "B". Even a cursory examination reveals that the signature on Exhibit "A" is unlike that on Exhibit "B". But to say that it bears no resemblance at all to the normal signature is, in my opinion, an overstatement. Even on the defence version the signature was, after all, intended to be a forgery of appellant's signature,

and the forger would no doubt, within his competence, have attempted to copy the normal signature. There is, at least, some basis for Klass' opinion that the signature on Exhibit "A" "Looks as though it was only pushed into the corner", but that it is nevertheless appellant's signature. Klass' evidence is by no means satisfactory, but I am far from satisfied that at the trial he dishonestly identified the signature on Exhibit "A" as being that of appellant. This conclusion does, of course, not mean that his evidence as to identification of the signature is in any way to be relied upon. His opinion evidence was no doubt coloured by what Lipchin had told him in regard to Exhibit"A".

Some point was made in argument of the fact that Klass denied knowledge of the reward offered by Lipchin. The point lacks any real substance. Although it might be said to be somewhat improbable that he did not know about it, there is no satisfactory evidence showing that he in fact knew.

It was also submitted that Klass' evidence was suspect because he had further dealings with appellant after the latter had in his presence admitted to the theft of diamonds from Lipchin. In this connection it is important to bear in

62/.....mind

mind that Klass deposed to only one occasion when appellant admitted receiving the diamonds from Lipchin, i.e., the morning of 17 October at appellant's home. At that time appellant did not admit to theft, but apparently gave an explanation that he had lost possession of the diamonds and that he would see to it that Lipchin did not suffer loss. Klass was cross-examined in regard to his further dealings with appellant. His attitude appears to have been that he became involved in a dispute between two persons, both of whom were his friends, and that he was not called upon to decide where the truth lay. It is highly improbable that Klass was party to a conspiracy with Lipchin to give false evidence against appellant. Klass said that he felt sorry for Lipchin and after appellant's arrest sought to raise the matter of the transaction between him and Lipchin with appellant. Appellant, however, appeared to be disinclined to discuss the matter and evaded the issue. On the assumption that Klass was conspiring with Lipchin to fabricate evidence, it is difficult to appreciate why Klass did not refer to further admissions by appellant.

Klass was, of course, concerned in the

use made by Lipchin of the approval slip which was handed to Lt. Marais on 18 October. According to Klass Lipchin required the form to fill it in for record purposes. Klass' conduct must, however, be judged with due regard to his evidence as to what had occurred at his home during the evening of 9 October and at appellant's home on the Friday morning (17 October).

My overall impression of Klass as a witness is that, despite several unsatisfactory features in his evidence, he found himself in the unhappy position of being involved in a dispute between Lipchin and appellant, both of whom were business associates of his and, moreover, friends of long standing. There is, in my opinion, no valid reason for suspecting that he was party to a conspiracy to fabricate evidence against appellant.

In so far as Myers is concerned, there is some substance in the submission that it is improbable that appellant would have made admissions to him. I will assume in appellant's favour that this evidence ought not to be put in the scale against him.

From what has been set out above, it appears, in my opinion, that at the end of the State case there was

confidence in the truth, which he believes will, by reason of inherent improbability, not commend itself to the police or the court. In the present case, however, Cillié, J.P., did not rely merely upon the false statement made on Saturday evening, in the course of which appellant sought to set up an alibi and, moreover, quite unnecessarily lied about a transaction which he admittedly had with Lipchin some short while before 9 October. The appellant attributed the making of the false statement to his state of fright and confusion at the time. Cillié, J.P., correctly in my opinion, took into account the further circumstances that appellant, notwithstanding adequate time for reflection after he had been arrested, did not avail himself of the several opportunities which he thereafter had to correct the statement he had made to Lt. Marais. It appears that his later willingness to correct some of the false information, flowed from an appreciation that the lie no longer served any purpose rather than from a desire to be frank. I may add that the reason for lying might in certain circumstances be even more important than the mere fact that a falsehood was uttered. It may well be asked what the probable reason was why appellant

lied about the motor car which was used by him on the Kimberley trip. From the evidence led at the trial it appears, in my opinion, most probable that appellant realised that if he were to have told the truth to Lt. Marais, namely that the motor car was one borrowed from Arsenis, Lt. Marais may have interviewed Arsenis and possibly heard from him what had occurred on 8 October. On appellant's version, there was no need to put Lt. Marais off the scent in so far as Arsenis was concerned, because the latter should have been able to confirm appellant's version as to what happened on 8 October, when 15 diamonds were supposedly handed over by Lipchin to appellant. In the circumstances, I am of the opinion that Cillié, J.P., was fully justified in drawing inferences adverse to appellant's credibility from the falsehood uttered on the Saturday evening and thereafter persisted in.

The appellant's version as to what occurred on 8 October is, in my opinion, counter to probability. The meeting at the café took place at appellant's instance and the possibility of a substantial transaction was foreshadowed. At the time appellant was, on his own evidence, not in a strong financial position. Lipchin had shortly before commenced business as

67/.....a

a diamond dealer. And yet, on appellant's version, the possibility of negotiating a deal worth some R40.000 was neglected by both appellant and Lipchin, neither showing any inclination after the meeting on 8 October to pursue the matter. On Lipchin's version he did pursue the matter, and secured a parcel worth R16.900 by the next day. On Lipchin's version, he had good reason for his anxious pursuit of appellant during the days which followed on 9 October. On appellant's version, there had been no trouble between him and Lipchin. They parted company on Friday morning (9 October), presumably on good terms, after appellant had paid R900 to Lipchin. The possibility of a very profitable transaction with Arsenis' father was, at least, still in the air. Appellant's arrest follows on 18 October without any further contact between them.

For the aforegoing reasons I am unpersuaded that Cillié, J.P., erred in his conclusion that the appellant's guilt had been established beyond any reasonable doubt.

The appeal is dismissed.

P.J. Olivier

JANSEN, J.A. }
RABIE, J.A. } CONCUR.